

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ERIC EDWARD JUELL,

Plaintiff,

CIV. NO. S-05-0378 FCD GGH

vs.

FOREST PHARMACEUTICALS,
INC., et al.,

Defendants.

ORDER

Previously pending on this court's law and motion calendar for June 29, 2006, was defendants' motion to compel medical examination of plaintiff pursuant to Fed. R. Civ. P. 35. Lizbeth West appeared for defendants. Linda Sloven appeared telephonically for plaintiff. Having heard oral argument and reviewed the parties' joint statement filed June 22, 2006, the court now issues the following order.¹

BACKGROUND

Plaintiff brings this action against his former employer Forest Pharmaceuticals and former supervisor David Williams, for age discrimination, age harassment, wrongful

¹ The parties filed a flurry of papers aside from the joint statement within the week before the hearing, all of which are not in compliance with E.D. Local Rule 37-251, and have not been considered.

1 termination, and for not preventing discrimination and harassment from occurring, all under the
 2 California Fair Employment and Housing Act. Pertinent to the instant dispute is plaintiff's claim
 3 of mental and emotional distress which he claims includes "frustration, depression, nervousness,
 4 anxiety and loss of self-worth," which has resulted in his inability to work. (Compl., ¶¶ 31, 39.)
 5 This claim is alleged in regard to all four causes of action, for age discrimination, age
 6 harassment, wrongful termination in violation of public policy, and violation of Cal. Govt. Code
 7 § 12940(k). Plaintiff seeks damages in excess of \$100,000, claiming he has suffered and will
 8 continue to suffer mental and emotional distress. (Compl., ¶¶ 39, 36, 53, 58.) The case was
 9 originally filed on January 26, 2005, in the superior court in Nevada County, and removed here
 10 under diversity jurisdiction on February 25, 2005. Plaintiff seeks damages.²

11 On June 20, 2006, the district court modified the scheduling order to permit the
 12 parties to file this motion and conduct any discovery ordered as a result.

13 DISCUSSION

14 A. Rule 35 Exam

15 Defendants seek to compel a medical exam of plaintiff so that their expert witness
 16 may render an opinion concerning plaintiff's mental health and emotional distress claims.

17 Plaintiff initially agreed to the examination but only if it was limited to ninety minutes, if no
 18 written testing was used, and if plaintiff were permitted to tape record the examination.³

19 Defendants seek an examination of eight hours duration, and want to use a variety of well-
 20 established and widely accepted methods of psychological testing and analysis, including the
 21 MMPI and MCMI personality tests. These conditions should level the playing field, according to
 22 defendants, because plaintiff has named two experts, both his treating healthcare providers, who
 23

24 ² Injunctive relief is merely a request that defendants follow the law by not participating
 25 in age discrimination.

26 ³ Plaintiff's other condition, that the expert's report be provided to plaintiff prior to the
 deposition of plaintiff's expert witness, was apparently agreed to by defendants.

1 have spent many hours with him over a number of years.

2 At the hearing, defendants represented that they had stipulated to allowing
3 plaintiff to tape record the exam, so long as it was not intrusive and was more than one hour in
4 length. As the court was not aware of this stipulation, defendants pointed to a footnote in their
5 papers which referred to this resolution. It appears that this resolution was mentioned in a
6 footnote in their motion to compel filed on June 22, 2006, one week before the hearing. As
7 noted above, this motion was not reviewed in deciding the instant motion as it is not in
8 compliance with Rule 37-251. Furthermore, if a point of contention that is one of the bases for
9 bringing the motion is later resolved, it should be mentioned in a place of more importance than
10 in a footnote.⁴

11 Legal Standards

12 “[I]n order for a party seeking to compel a psychiatric examination under Rule 35
13 to establish that the other party’s mental condition is ‘in controversy’ within the meaning of the
14 Rule, the moving party must show more than that the party in question has claimed emotional
15 distress.” Turner v. Imperial Stores, 161 F.R.D. 89, 97 (S.D.Cal.1995); accord, Ford v. Contra
16 Costa County, 179 F.R.D. 579, 580 (N.D.Cal. 1998). Before a mental examination is compelled,
17 in addition to a bare claim for mental distress, the moving party should demonstrate one or more
18 of the following:

- 19 1) a cause of action for intentional or negligent infliction of
20 emotional distress; 2) an allegation of a specific mental or
21 psychiatric injury or disorder; 3) a claim of unusually severe
emotional distress; 4) plaintiff’s offer of expert testimony to
support a claim of emotional distress; and/or 5) plaintiff’s

22
23 ⁴ As also mentioned earlier, the joint stipulation filed on June 22, 2006 was the only
24 pleading filed in compliance with Rule 37-251, and the only document considered for this order.
25 Unfortunately, it is actually a photocopy of a joint statement first filed on May 9, 2006. The
26 parties did not bother to update their statement but just re-filed it. As a result, it includes outdated
issues such as plaintiff’s claim that defendants are in “procedural default” by failing to compel
this examination by the March 31, 2006 discovery cutoff. This argument is moot since Judge
Damrell has since extended the time to hear this motion. Such laziness and failure to comply
with the local rules wastes court resources.

concession that his or her mental condition is ‘in controversy’ within the meaning of Rule 35(a).

Turner, 161 F.R.D. at 95.⁵

Cases which involve little more than garden variety allegations of past emotional distress ordinarily are not sufficient to require a mental exam. Sabree v. United Broth. of Carpenters & Joiners, 126 F.R.D. 422, 426 (D. Mass. 1989) (finding that although complaint contained specific claims for emotional distress under state law, plaintiff’s mental condition was not at issue); Benchmaster, Inc. v. Kawaelde, 107 F.R.D. 752, 754 (E.D. Mich. 1985) (proffering rationale that psychiatrist could aid only in determining present emotional disturbance). Mental exams are generally not allowed absent specific facts demonstrating emotional state will be at issue. See, e.g., Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 298 (E.D. Pa. 1983) (plaintiff had designated testifying psychiatric experts and had received psychiatric care).

Claims for past emotional distress at best permit the court discretion whether to allow a Rule 35 exam. Hodges v. Keane, 145 F.R.D. 332, 334 (S.D.N.Y. 1993). The determination is made on a case by case basis. See, e.g., Ziemann v. Burlington County Bridge Com’n, 155 F.R.D. 497, 501 (D.N.J. 1994) (considering, *inter alia*, alleged injury and whether claim is ongoing); Anson v. Fickel, 110 F.R.D. 184, 186 (N.D.Ind. 1986) (considering resort to psychiatric or psychological counseling).

Analysis

Plaintiff has raised specific facts demonstrating that he has placed his emotional state in controversy, including his concession that he has been under the care of a psychiatrist and a psychologist due to emotional distress suffered in connection with his employment. Juell

⁵ As Judge Aaron noted, only one published opinion in the Ninth Circuit prior to Turner addressed the IME issue--Smedley v. Capps, Staples, Ward, Hastings & Dodson, 820 F.Supp. 1227 (N.D.Cal.1993). The Smedley court granted defendants’ motion for mental examination, solely because of plaintiff’s bare claim of emotional distress. As the Turner court observed, the Smedley court reached its conclusion without analysis or citation to authority. Turner, 161 F.R.D. at 93. Accordingly, this court relies on the careful analysis set forth in Turner.

Decl. ¶ 3. Accordingly, an independent medical examination is appropriate. The length of the proposed exam is reasonable; therefore it shall be limited to eight hours, which includes an hour break for lunch. Defendants' expert will be permitted to conduct reasonable testing as he determines is necessary. Plaintiff is permitted to tape record the exam so long as the tape is longer than one hour and is not intrusive.

B. Defense Expert Deposition

Plaintiff requests that pursuant to Judge Damrell's modification of the scheduling order, he be permitted to take Dr. Weissman's (defendants' expert) deposition before August 31, 2006, and that his file be provided to plaintiff at least a week before the deposition. Plaintiff's request is granted.

CONCLUSION

Accordingly, IT IS ORDERED that:

1. Defendants' motion to compel Rule 35 medical examination is granted in accordance with the conditions set forth in this order.

2. Plaintiff's request to take Dr. Weissman's deposition before August 31, 2006 is granted. Defendants shall provide plaintiff with this expert's file at least one week before the deposition.

DATED: 7/5/06

/s/ Gregory G. Hollows

GREGORY G. HOLLOWES
U. S. MAGISTRATE JUDGE

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